

IN THE SUPREME COURT OF MISSOURI

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SUPREME COURT NO. SC86065

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STATE ex rel. FORD MOTOR COMPANY,

Relator/Defendant,

vs.

THE HONORABLE MICHAEL W. MANNERS, CIRCUIT COURT OF JACKSON  
COUNTY, MISSOURI, AT INDEPENDENCE,

Respondent.

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BRIEF OF RELATOR FORD MOTOR COMPANY

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Respectfully submitted,

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### **JURISDICTIONAL STATEMENT**

This action is one involving the question of whether Respondent, Honorable Michael W. Manners, can take any further action on this matter other than transferring the case from Jackson County to a county where venue is proper. This case was initiated against Ford Motor Company in Jackson County, however, venue is improper in Jackson County in that none of the defendants are residents of Jackson County and the cause of action did not accrue in Jackson County pursuant to Missouri Revised Statute section 508.010(2). This Court has jurisdiction of this writ proceeding pursuant to the Missouri Constitution, Article V, section 4, and Mo. Rev. Stat. § 530.020, both of which grant the Supreme Court the ability to issue and consider remedial writs.

## **STATEMENT OF FACTS**

On October 15, 2003, plaintiffs initiated the underlying lawsuit by serving Roger Burnett, an employee of Relator Ford Motor Company (“Ford”), with the Summons and a copy of the Petition for Damages (“Petition”) in the case captioned Rusty Herring, Individually and as Next Friend for Marissa Herring and Megan Herring, Minors at the Independence, Missouri courthouse. (Copies of the Summons and Petition are attached as Exhibit A). The underlying products liability action arises from a two-vehicle accident involving a 2000 Ford Windstar that occurred on May 10, 2003 in Chariton County, Missouri. (Petition at ¶¶ 4, 6, 7, 9). Plaintiffs brought, *inter alia*, strict liability and negligence claims against Relator. (Petition at Counts II & III).

The residency of the parties, with respect to venue, is as follows:

(1) The Petition states that plaintiff Rusty Herring is a resident of Jackson County, Missouri. (Petition at ¶ 1). However, although the Petition’s caption indicates Rusty Herring is suing “Individually and as Next Friend for Marissa Herring and Megan Herring,” Rusty Herring did not state any claims for individual injuries in the Petition. Therefore, Rusty Herring is not the “plaintiff” for purposes of analysis under the statute. See Fischer v. Fischer , 34 S.W.3d 263, 265 (Mo. Ct. App. 2000) (stating “a next friend is not a party to the litigation”). Rather, the “plaintiffs” are the minor children who were alleged to have been injured in the lawsuit, Megan and Marissa Herring. Plaintiffs did not plead the residency of Megan and Marissa Herring in their Petition.

(2) Defendant Daniel Baker is the duly appointed Personal Representative for the Estate of Terry Jean Baker, deceased, and is a citizen and resident



of the State of Missouri. (Petition at ¶ 2). Plaintiffs did not plead that either Daniel Baker or Terry Baker are or were residents of Jackson County, Missouri. Further, defendant Baker has asserted that the Estate of Terry G. Baker is located in Linn County, Missouri. (See Defendant Daniel Baker's Motion for Change of Venue, attached as Exhibit B).

(3) Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan. (Petition at ¶ 3). For venue purposes, Ford is a resident of St. Louis County, Missouri, where its registered agent is located.

On November 20, 2003, Ford filed a Motion for Change of Venue and/or Rule 55.27 Motion to Dismiss For Insufficient Process and/or Service of Process in which Ford asserted venue was not proper in Jackson County under Mo. Rev. Stat. § 508.010 because the cause of action did not accrue in Jackson County, and plaintiffs' Petition failed to allege that any defendant resided in Jackson County. Alternatively, Ford asserted the case should be dismissed for insufficient service of process because the person served by plaintiffs was not an officer, partner, or managing or general agent of Ford, pursuant to Mo. R. Civ. P. 54.13(b)(3). (A copy of Ford's motion is attached as Exhibit C).

On December 10, 2003, plaintiffs filed a Reply to Ford's Motion for Change of Venue. Plaintiffs asserted that venue was proper in Jackson County pursuant to Mo. Rev. Stat. § 508.010(1) because plaintiffs were residents of Jackson County and both defendants were "found" in Jackson County, in the sense that they were served process there. (A copy of plaintiffs' motion is attached as Exhibit D). Plaintiffs argued

that the term “defendant” in section 508.010(1) should be applied in the “collective” sense and, thus, would include a case involving multiple defendants.

On December 27, 2003, Ford filed its Reply Brief in Support of its Motion to Dismiss or Transfer in which it asserted that plaintiffs were erroneously relying on section 508.010(1) to establish venue. Instead, Ford argued the plain language of the statute clearly indicated section 508.010(1) applied to cases involving a *single* defendant, and pursuant to sections (2) and (3) of the statute, which deal with multiple defendants, suit may only be brought in any county in this state in which any defendant resides or where the accident occurred. Ford again argued that since plaintiffs did not allege that either defendant resided in Jackson County, and the cause of action did not accrue there, venue was not proper. Additionally, Ford asserted that even if section 508.010(1) did apply, Ford was not “found” in Jackson County because the person served by plaintiffs (Roger Burnett, an engineer at Ford) was neither an officer nor general agent of Ford, as required by Mo. R. Civ. P. 54.13(b)(3). (A copy of Ford’s Reply Brief, dated December 27, 2003, is attached as Exhibit E).

According to the affidavit of Roger Burnett, unchallenged by any evidence presented by plaintiffs, Mr. Burnett is not an officer or principal of Ford and is not authorized by Ford to accept service on its behalf. (A copy of the Affidavit of Roger Burnett of Dec. 23, 2003, is attached as Exhibit F) (originally filed with Ford’s Reply Brief, attached as Exhibit E). Roger Burnett also submitted a second affidavit, in response to additional argument by plaintiffs, again unchallenged by any evidence presented by plaintiffs, in which he stated that he is an engineer at Ford Motor Company

and was testifying in that capacity when he was served. He further stated that he had no involvement in that litigation beyond his testimony as a witness, and that he is not in the “business” of conducting litigation on behalf of Ford. (A copy of the Affidavit of Roger Burnett of Jan. 16, 2004 is attached as Exhibit G).

On January 9, 2004 defendant Daniel Baker filed his own separate Motion for Change of Venue in which he asserted that he was acting as the Personal Representative of the Estate of Terry G. Baker, which is located in Linn County, Missouri. Defendant Baker stated he was personally served in Jackson County, but that plaintiffs had yet to serve the Estate of Terry G. Baker. See Mo. Rev. Stat. § 473.367 (in order for plaintiffs to proceed against the estate, plaintiffs must serve the Petition upon both the personal representative and the probate division where the estate is located). Defendant Baker argued that “even though Daniel Baker was served in Jackson County, the Estate (which is the true Defendant in this cause of action) has yet to be properly served.” (See Defendant Baker’s Motion for Change of Venue, at p. 3, Exhibit B). He further argued that once the estate was properly served, the proper venue for this action would be Linn County.

Before the court ruled on Ford’s motion to transfer venue, defendant Daniel Baker withdrew his own separate Motion for Change of Venue and waived any objection to venue in Jackson County. (A copy of defendant Baker’s withdrawal pleading is attached as Exhibit H).

In its Order dated March 16, 2004, Respondent ordered Ford and plaintiffs to submit supplemental briefing to address two questions: (a) Where one defendant

consents to venue, what effect does that consent have on the right of other defendants to change venue?; and (b) Where service of process is insufficient, is the proper remedy dismissal or quashing of service? (A copy of the Court's March 16, 2004 Order is attached as Exhibit I).

Ford filed its supplemental brief on April 5, 2004, in which it argued that one defendant's waiver of improper venue has no effect on a co-defendant, and deferred to the Court's judgment in determining if quashing plaintiffs' service of process is the most appropriate remedy.<sup>1</sup> (A copy of Ford's Supplemental Brief is attached as Exhibit J).

Plaintiffs filed their supplemental brief on April 12, 2004. Plaintiffs attempted to distinguish the case relied upon by Ford, and stated they could not locate any other Missouri case that directly addressed the issue that was pending before the court regarding consent to improper venue by a co-defendant. Plaintiffs further asserted

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<sup>1</sup> Relator acknowledges that quashing insufficient service of process is the general rule, however, either remedy, a dismissal or an order quashing service, would destroy plaintiffs' alleged basis for venue in Jackson County. Relator was only concerned with improper service of process because plaintiffs were basing their venue allegation on the premise that Relator was "found" in Jackson County via plaintiffs' improper service. Based on this, Relator simply deferred to the Court's judgment to determine the appropriate remedy as to this issue.

that quashing of service was the appropriate remedy for insufficient service of process. (A copy of Plaintiffs' Supplemental Brief is attached as Exhibit K).

Respondent, the Honorable Michael W. Manners, overruled Ford's Motion to Transfer, in an Order dated April 22, 2004, in part because of the "doubtful continuing vitality as precedent" of the case relied upon by Ford in its brief regarding the issue of consent to improper venue by a co-defendant. Specifically, Respondent's Order says that Ford's venue motion will be overruled within 14 days of the Order unless prevented from doing so by a court of proper jurisdiction. (A copy of Respondent's April 22, 2004 Order is attached as Exhibit L).

Ford filed a Writ of Prohibition, along with Suggestions in Support, in the Western District Court of Appeals on May 6, 2004. (A copy of the Writ is attached as Exhibit M and a copy of the Suggestions in Support is attached as Exhibit N). Plaintiffs filed Suggestions in Opposition to Ford's Writ of Prohibition. (A copy of plaintiffs' Suggestions in Opposition is attached as Exhibit O). Ford's Writ was summarily denied, without opinion, by the Court of Appeals on May 19, 2004. (A copy of the Court of Appeals' Order is attached as Exhibit P).

Ford filed a Petition for Writ of Prohibition, along with Suggestions in Support, in this Court on June 18, 2004. A Preliminary Writ of Prohibition was ordered on August 24, 2004. Plaintiffs filed their Answer to Petition for Writ of Prohibition on September 22, 2004. (A copy of Plaintiff's Answer to Petition for Writ of Prohibition is attached as Exhibit Q).

**POINTS RELIED ON**

**POINT RELIED ON NO. 1: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN TRANSFERRING THE CASE TO A COUNTY WHERE VENUE IS PROPER BECAUSE VENUE IS IMPROPER IN JACKSON COUNTY, IN THAT NONE OF THE DEFENDANTS ARE RESIDENTS OF JACKSON COUNTY AND THE CAUSE OF ACTION DID NOT ACCRUE IN JACKSON COUNTY PURSUANT TO MISSOURI REVISED STATUTE § 508.010(2).**

**A. MISSOURI REVISED STATUTE § 508.010(2) APPLIES.**

**B. ASSUMING ARGUENDO MO. REV. STAT. § 508.010(1) WAS APPLICABLE, ITS TERMS ARE NOT MET IN THE PRESENT CASE.**

State ex rel. St. John's Mercy Health Care v. Neill, 95 S.W.3d 103 (Mo. banc 2003)

State ex rel. England v. Koehr, 849 S.W.2d 168 (Mo. Ct. App. 1993)

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. 2002)

Minihan v. Aronson, 165 S.W.2d 404 (Mo. 1942)

Mo. Rev. Stat. § 508.010

**POINT RELIED ON NO. 2: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN TRANSFERRING THE CASE TO A COUNTY WHERE VENUE IS PROPER BECAUSE VENUE IS IMPROPER IN JACKSON**

**COUNTY, IN THAT WAIVER OF IMPROPER VENUE BY ONE DEFENDANT  
IS NOT BINDING ON ANOTHER DEFENDANT.**

Marlo v. Hess, 669 S.W.2d 291 (Mo. Ct. App. 1984)

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962)

Hines v. Dresser Industries, Inc., 484 N.E.2d 401 (Ill. App. 1985)

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Relator seeks this writ on the ground Respondent has misconstrued or misapplied the law with respect to venue pursuant to Mo. Rev. Stat. § 508.010. Where the claim is that the trial court misconstrued or misapplied the law, the appellate court reviews the trial court's decision on a de novo basis. See, e.g., McGhee v. Dickson, 973 S.W.2d 847, 848 (Mo. banc 1998); Fishman v. Joseph, 14 S.W.3d 709, 715 (Mo. Ct. App. 2000).

Prohibition is a discretionary writ that may be issued to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. State ex rel. York v. Daugherty, 969 S.W.2d 223, 224 (Mo. banc 1998). Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction. State ex rel. Green v. Neill, 127 S.W.3d 677, 678 (Mo. banc 2004). If venue is improper in the county where an action is brought, prohibition lies to bar the trial court from taking any further action except to transfer the case to a county of proper venue. Id.; State ex rel. Reedcraft Mfg., Inc. v. Kays, 967 S.W.2d 703, 704 (Mo. Ct. App. 1998); State ex rel. Quest Communications Corp. v. Baldridge, 913 S.W.2d 366, 368 (Mo. Ct. App. 1996).



**II. POINT RELIED ON NO. 1: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN TRANSFERRING THE CASE TO A COUNTY WHERE VENUE IS PROPER BECAUSE VENUE IS IMPROPER IN JACKSON COUNTY, IN THAT NONE OF THE DEFENDANTS ARE RESIDENTS OF JACKSON COUNTY AND THE CAUSE OF ACTION DID NOT ACCRUE IN JACKSON COUNTY PURSUANT TO MISSOURI REVISED STATUTE § 508.010(2).**

**A. MISSOURI REVISED STATUTE § 508.010(2) APPLIES.**

Plaintiffs' Petition names both a corporation and an individual as defendants. Therefore, Section 508.010, the general venue statute, applies to determine venue. See State ex rel. St. John's Mercy Health Care v. Neill, 95 S.W.3d 103, 107 (Mo. banc 2003) (Section 508.010 of the Missouri Revised Statutes sets forth proper venue for suits in which corporations and individuals are named as defendants); State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996) (applying section 508.010(2) to action involving corporation hospital and individual doctors); State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 823 (Mo. banc 1994) (applying section 508.010(2) to action involving individual and corporate defendants). Section 508.010 provides, in pertinent part:

Suits instituted by summons shall, except as otherwise provided by law, be brought:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

...

(6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties, and process therein shall be issued by the court of such county and may be served in any county within the state.

Mo. Rev. Stat. § 508.010 (1, 2, 3, 6) (A copy of the full text of the statute is attached as Exhibit R).

Where an “individual and corporation are joined, venue may be obtained only at a ‘residence’ of one the defendants (or at the venue of the tort).” State ex rel. England v. Koehr, 849 S.W.2d 168, 169 (Mo. Ct. App. 1993) (applying section 508.010(3) & (6) to a case involving a Nevada corporate defendant and an individual Missouri resident defendant). For the purposes of this statute, a corporation “resides” in the county in which it has its registered office or registered agent. State ex rel. Riley v.

McHenry, 801 S.W.2d 779, 781 (Mo. Ct. App. 1991) (“When one or more corporations are sued along with one or more individuals . . . the county of residence of corporations in such circumstances is the county in which they maintain their registered office.”); Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. banc 1991) (“The county of residence for a business corporation for purposes of 508.010 is the county where its registered office and agent is maintained.”); State Farm Mutual Auto. Ins. v. Ryan, 766 S.W.2d 727, 728 (Mo. Ct. App. 1989) (“A foreign corporation licensed to do business in Missouri ‘resides’ in the county where its registered office and registered agent is located.”).

Under section 508.010(2), which applies in the case at bar because there are “several defendants, and they reside in different counties,” venue is improper because none of the defendants are residents of Jackson County and the cause of action did not accrue there. See State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 143 (Mo. 2002 (stating “section 508.010(2), the portion of the general venue statute that governs suits against *multiple defendants*, applies when an individual and one or more for-profit corporations are sued together) (emphasis added). As stated previously, plaintiffs failed to plead that either Daniel Baker or Terry Baker are or were residents of Jackson County, Missouri.<sup>2</sup> Defendant Ford is a Delaware corporation with its principal

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<sup>2</sup> Further, defendant Baker has asserted that the Estate of Terry G. Baker is located in Linn County, Missouri. (See Defendant Baker’s Motion for Change of Venue, attached as Exhibit B).

place of business in Dearborn, Michigan. For venue purposes, Ford is a resident of St. Louis County, Missouri, where its registered agent is located.<sup>3</sup>

Contrary to plaintiffs' assertion, subsection (1) of the statute does not apply when there are multiple defendants, or the legislature would not have felt the need to begin both subsections (2) and (3) with the words "when there are several defendants." See SSM Health Care, 78 S.W.3d at 143 (stating "section 508.010(2), the portion of the general venue statute that governs suits against *multiple defendants*, applies when an individual and one or more for-profit corporations are sued together) (emphasis added); see also Minihan v. Aronson, 165 S.W.2d 404, 407 (Mo. 1942) (discussing the general venue statute and stating "if the action is personal the suit must be instituted in the county of the defendant's residence or the county of the plaintiff's residence when the defendant is found there, *except, of course, when there are several defendants*") (emphasis added) (overruled on other grounds, State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 821 (Mo. 1994)). Thus, Missouri case law, along with the plain language of the statute, establishes that section 508.010(1) only applies to a single defendant, while sections 508.010(2) & (3) apply when there are multiple defendants. As previously mentioned, subsection (2) applies to this case, because there are "several defendants, and they reside in different counties." Section 508.010(2) only allows for proper venue in a county where any defendant resides or where the cause of action

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<sup>3</sup> Ford's registered agent is The Corporation Company, located at 7733 Forsyth Boulevard, Suite 640, Clayton, Missouri, St. Louis County, Missouri.

accrued. Since neither defendant Baker nor defendant Ford are residents of Jackson County, and the accident did not occur in Jackson County, venue is improper in Jackson County.

In sum, venue is proper only where the cause of action accrued or where one of the two defendants reside. See England, 849 S.W.2d at 169 (stating where an “individual and corporation are joined, venue may be obtained only at a ‘residence’ of one the defendants (or at the venue of the tort)).” Plaintiffs have attempted to distinguish England on the basis that England involved an unregistered corporate defendant. However, nowhere in the England decision does the court even remotely imply that its decision is based upon a finding that there is an unregistered corporation in the case. Moreover, case law establishes section 508.010(2) applies when an individual and one or more corporations are sued together. SSM Health Care, supra (stating Section 508.010(2), the portion of the general venue statute that governs suits against *multiple defendants*, applies when an individual and one or more for-profit corporations are sued together) (emphasis added); Minihan, supra (discussing the general venue statute and stating “if the action is personal the suit must be instituted in the county of the defendant’s residence or the county of the plaintiff’s residence when the defendant is found there, *except, of course, when there are several defendants*”) (emphasis added).

On the other hand, plaintiffs rely entirely on State ex rel. L.T. Kissinger v. Allison, 328 S.W.2d 952 (Mo. Ct. App. 1959), a case that does not even involve a corporate defendant, to assert that section 508.010(1) should apply. According to the

case reporter publication, Kissinger was not submitted to the Missouri Supreme Court for review or consideration, and almost every case that has been decided since then has emphasized that when an individual and one or more corporations are sued together, section 508.010(2) applies. See SSM Health Care, supra; England, supra. Plaintiffs have failed to overcome the “several defendants” plain language of the statute and cases interpreting this language. Further, plaintiffs have not produced any other case law or statute that supports their position that section 508.010(1) applies to this case. Meanwhile, Ford has produced both case law and the plain language of the statute which state that Jackson County is not the proper venue for this case. See Mo. Rev. Stat. § 508.010 (2, 3); England, supra; State ex rel. Parks v. Corcoran, 625 S.W.2d 686 (Mo. Ct. App. 1981) (“It has long been held that when one or more corporations are sued along with one or more individuals, section 508.010(2) is applicable and that the county of residence of corporations in such circumstances is the county in which they maintain their registered office.”). Thus, under section 508.010, venue in the underlying case is improper in Jackson County. Respondent, therefore, should be ordered to take no further action on such case other than transferring it to a county where venue is proper, namely Chariton County or St. Louis County.

**B. ASSUMING ARGUENDO MO. REV. STAT. § 508.010(1) WAS APPLICABLE, ITS TERMS ARE NOT MET IN THE PRESENT CASE.**

Assuming *arguendo* that section 508.010(1) did apply to this case, plaintiffs have still not met the terms of the statute because defendant Ford was not “found” in

Jackson County and plaintiffs did not plead the residency of Megan and Marissa Herring in their Petition. With respect to the first argument, service of process on Roger Burnett, an engineer at Ford, is not enough to establish proper service on a corporation. In order to properly serve a corporation, plaintiffs must serve an officer, partner, or managing or general agent. Mo. R. Civ. P. 54.13(b)(3); Mo. Rev. Stat. § 506.150(3). Plaintiffs served Roger Burnett, an engineer at Ford, while he was at the Jackson County Courthouse testifying in an unrelated case. Mr. Burnett submitted an affidavit, unchallenged by any evidence presented by plaintiffs, stating that he is not an officer or principal at Ford, nor is he authorized to accept service on Ford's behalf. (See Affidavit of Roger Burnett (First), attached as Exhibit F).

As used in Rule 54.13, the term "general agent" has been interpreted to mean "manager." MFA Mutual Ins. Co. v. Rooney, 406 S.W.2d 1, 4 (Mo. banc 1966). Additionally, a "general agent" is "[o]ne empowered to transact all business of [the] principle at any particular time or any particular place, a general manager." Id.; see also Kitchens v. Missouri P. R. Co., 737 S.W.2d 219, 223 (Mo. Ct. App. 1987) (noting that the terms "managing or general agent," as used in Rule 54.13 have a technical meaning) (citing Howell v. Autobody Color Co., Inc., 710 S.W.2d 902, 905 (Mo. Ct. App. 1986)).

Plaintiffs originally asserted that Roger Burnett was an agent of Ford because he was employed by Ford and was in Jackson County testifying in a Ford case. Ford then filed a response which pointed out that under Missouri law, service is proper only if made upon a "general" agent. Furthermore, Ford noted that a "general" agent is one who conducts all of the principal's business in a given location. Plaintiffs have now

asserted that Ford is “in the business of litigation” and that Roger Burnett was in Jackson County to conduct Ford’s litigation. Obviously, Ford Motor Company is in the business of manufacturing automobiles. Nowhere in Ford’s Articles of Incorporation or Bylaws is the intent to be in the litigation business.

Furthermore, Roger Burnett is a design engineer and not an attorney. Mr. Burnett was in no way involved in the litigation, beyond testifying as a witness called at trial. (See Affidavit of Roger Burnett (Second), attached as Exhibit G). Plaintiffs’ assertion that Ford is in the business of litigation and that Roger Burnett was in some way in charge of that business is a phenomenal stretch of reasoning and is completely unsupported by any evidence or case law. In addition, if plaintiffs’ argument was true, then any corporation would be in the “litigation business” merely by being sued. Plaintiffs can present no evidence to this Court that Roger Burnett was a “general” agent of Ford. Therefore, plaintiffs have failed to prove that Roger Burnett is a “general agent” as required by Missouri law. Moreover, Ford has directly contradicted plaintiffs’ unsupported allegations and established conclusively that service was not proper.

In regards to the second argument, there was no evidence or even an allegation before Respondent at the time of his ruling that plaintiffs Megan and Marissa Herring resided in Jackson County. The Petition states that plaintiff Rusty Herring is a resident of Jackson County, Missouri. However, although the Petition’s caption indicates Rusty Herring is suing “Individually and as Next Friend for Marissa and Megan Herring,” Rusty Herring did not state any claims for individual injuries in the Petition. Therefore, Rusty Herring is not the “plaintiff” for purposes of analysis under the statute.



See Fischer v. Fischer, 34 S.W.3d 263, 265 (Mo. Ct. App. 2000) (stating “a next friend is not a party to the litigation”). Rather, the “plaintiffs” are the minor children who were alleged to have been injured in the lawsuit, Megan and Marissa Herring. Plaintiffs did not plead the residency of Megan and Marissa Herring in their Petition. In fact, as of the current date, plaintiffs have still not pled the residency of Megan and Marissa Herring. As such, on the information present before Respondent at the time of his decision, plaintiffs had not properly pled their residency as Jackson County. See Mummert, 870 S.W.2d at 823 (stating “venue is determined as the case stands when *brought*, not when a motion challenging venue is decided”) (emphasis in original); State ex rel. Private Nursing Service, Inc. v. Romines, 130 S.W.3d 28, 29 (Mo. Ct. App. 2004) (stating “venue is determined at the time an action is brought, or filed”). Based on the above, even if section 508.010(1) did apply to the case at bar, none of the elements of that subsection were present in the record before Respondent.

**III. POINT RELIED ON NO. 2: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN TRANSFERRING THE CASE TO A COUNTY WHERE VENUE IS PROPER BECAUSE VENUE IS IMPROPER IN JACKSON COUNTY, IN THAT WAIVER OF IMPROPER VENUE BY ONE DEFENDANT IS NOT BINDING ON ANOTHER DEFENDANT.**

Respondent, in his Order of March 16, 2004, requested supplemental briefing by the parties on the following issue: where one defendant consents to venue, what effect does that consent have on the right of other defendants to change venue?

Respondent's March 16, 2004 Order indicates implicit agreement with Relator that venue is improper in Jackson County but for defendant Baker's action of withdrawing his venue motion and waiving any objection to improper venue, or there would have been no need to have the parties submit additional briefing on the subject of a co-defendant's consent to venue. Put differently, if Respondent already believed, and was going to rule, that venue was proper in Jackson County, it would not matter that defendant Baker consented to venue because (1) there would be no need for him to consent to venue, and (2) Ford would not in any way be affected by his consent, since venue would already be proper.

Nevertheless, defendant Baker's waiver of improper venue has no effect on venue as to Ford. Ford still has rights concerning venue under Missouri law, and these rights cannot be waived by a co-defendant. See Marlo v. Hess, 669 S.W.2d 291, 292 (Mo. Ct. App. 1984)(stating venue is a "*personal privilege* which may be waived *by the person entitled to assert it*") (citing Hutchison v. Steinke, 353 S.W.2d 137, 139 (Mo. Ct. App. 1962)) (emphasis added); see also Kissinger, 328 S.W.2d at 953 (stating "[t]he venue statute must be met and complied with as to *each* defendant") (emphasis added).

The Supreme Court of Missouri's conclusion in State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962), that "any waiver of improper venue by [the co-defendant] is not controlling or binding in any manner on [the other defendant]" is directly on point. Bowden, 359 S.W.2d at 345. Although Respondent is correct in stating that Bowden has been overruled concerning the "now-discredited proposition that proper venue is necessary before service of process will confer jurisdiction," (See

April 22, 2004 Order, p. 2, Exhibit L), no case has ever overruled the separate and distinct proposition in Bowden that a co-defendant's waiver of improper venue is "not controlling or binding in any manner" on the other defendant.<sup>4</sup>

Relator has not found any other Missouri cases directly on point on this issue. However, a review of cases in other jurisdictions reveals that every other court that has addressed this issue has concluded that a co-defendant's waiver of improper venue is not controlling on another defendant. This, in addition to the rule set forth in Bowden, supports Relator's position. See, e.g., O'Brien v. Weber, 137 F. Supp 684, 685 (W.D. Pa. 1955) (holding that the waiver of venue by one defendant does not establish venue as to all parties because "a venue statute gives a 'personal privilege' to a defendant which he may assert or waive at his election"); Beneficial Industrial Loan Corp. v. Kline, 41 F. Supp 854, 856 (S.D. Iowa 1941) (holding waiver of venue by one defendant did not waive venue as to a co-defendant); Hines v. Dresser Industries, Inc., 484 N.E.2d 401, 405 (Ill. App. 1985) (holding waiver of objection to an improper venue by one defendant will

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<sup>4</sup> Moreover, since Bowden was overruled by Mummert in 1994 with respect to the proposition that proper venue is necessary before service of process will confer jurisdiction, other Missouri courts have cited to Bowden as precedent for separate and distinct propositions of law. See, e.g., State ex rel. Smith v. Gray, 979 S.W.2d 190, 195 (Mo. 1998) (citing Bowden for the proposition that a corporation's residence is the county where its registered office is maintained); Reller v. Hamline, 895 S.W.2d 659, 661 (Mo. Ct. App. 1995) (citing Bowden as precedent for the definition of "reside").

not preclude an objection to improper venue by a co-defendant); Laster v. Gottschalk, 42 Mich. App. 596, 602, 202 N.W.2d 562 (1972) (stating “one defendant’s waiver of venue did not transform the improperly laid venue into properly laid venue ” and “waiver of venue is personal to a defendant”); City of Cleveland v. Cheatham, 285 P.2d 205, 207 (Okla. 1955) (“When the case was filed in [the improper venue], each defendant had a right to object, that right being personal to the respective defendants.”).

The facts from Hines v. Dresser Industries, Inc. are extremely similar to the facts currently before the Court, and is persuasive. In Hines, plaintiff filed a lawsuit against an individual defendant and a corporate defendant in a county that bore no relation whatsoever to the residence of either defendant or to the situs of the accident that gave rise to the cause of action. Hines, 484 N.E.2d at 403. In that case, the corporate defendant waived its objection to improper venue by failing to timely object. Id. This presented the court with the question of “whether the failure of one defendant to object to an improper venue, deemed to be a waiver of such objection, precludes the co-defendant from also making his own objection to an improper venue?” Id. The court stated, “[w]e believe the answer to this question must be no.” Id. The court examined the purpose of the venue statute and certain public policy considerations, and ultimately concluded that “waiver of venue is personal to a defendant,” and, therefore, that “waiver of objection to an improper venue by one defendant will not preclude an objection to improper venue by a co-defendant.” Id. at 405.; see also Cheatham, 285 P.2d at 207. Specifically, the Hines court stated, in reference to Illinois’ venue statute, that:

The legislature clearly meant to protect a defendant against being sued in a county arbitrarily selected by a plaintiff, wherein the defendant does not reside, or in which no part of the transaction occurred which gave rise to the cause of action. If a plaintiff could so select to the county to bring suit, obviously a defendant would be entirely at his mercy, since such an action could be made oppressive and unbearably costly.

Id. at 404. (internal citations omitted).

Relator makes the same argument now, which is entirely consistent with the venue policies announced by Missouri courts. The primary purpose of the venue statute in Missouri is to provide a “convenient, logical, and orderly forum” for litigation and/or the “resolution of disputes.” England, 856 S.W.2d at 59; Reedcraft, 967 S.W.2d at 704; Quest, 913 S.W.2d at 369. Allowing plaintiffs to select a forum in which neither defendant resides, nor where the accident occurred, frustrates this purpose. Additionally, if a co-defendant can waive improper venue for another defendant, then venue no longer becomes “a valuable privilege conferred upon the defendant.” Hines, 484 N.E.2d at 404; see also Marlo, 669 S.W.2d at 294 (stating venue is a “*personal privilege* which may be waived by the person entitled to assert it”) (emphasis added).

Finally, in Hines, the court stated that “although the trial court considered the matter as one of acquiring jurisdiction over the parties, it is to be noted that the issue presented is not one of jurisdiction; rather, it is one of proper venue.” Id. at 403.. This

relates back to Respondent's Order and his language that Bowden is of "doubtful continuing vitality as precedent." (Order, p. 2). The line of cases that have overruled Bowden hold that proper venue is no longer necessary before service of process will confer jurisdiction. For example, a summons can now issue from a court in which venue is not proper to acquire jurisdiction over a defendant. However, the issue currently before this Court is not one of jurisdiction, rather, it is one of proper venue. In fact, the case Respondent cites in his April, 22, 2004 Order as the one which overruled Bowden specifically states that Missouri is *severing* the two concepts of jurisdiction and venue. (See Order, p. 2, Exhibit L, citing Mummert, 870 S.W.2d at 822). Thus, although the court may be able to obtain jurisdiction over a defendant, that does not correct a defect as to venue. The specific holding in Mummert stated, "Assuming the summons is not itself defective for some other reason, proper service of that summons results in personal jurisdiction over the defendant served. To the extent they hold otherwise, we overrule [a long list of cases]." Id.

The Mummert court does not in any way overrule Bowden's holding that one defendant waiving an objection to improper venue cannot bind the other defendant. Moreover, the Mummert court itself issued its holding regarding jurisdiction and still held that "the trial court failed to . . . transfer this case to a county in which venue was proper." Id. at 821. In short, Mummert simply held that venue and jurisdiction are now separate concepts in Missouri. The question presented to Respondent was not whether a properly served summons issued from an improper venue could acquire jurisdiction over a defendant; rather, the question was, does a waiver of improper venue by one defendant

preclude the co-defendant from making his own objection to an improper venue? The Bowden court, in a statement of law that has never been overruled, definitively stated no. Other courts, both state and federal, have agreed with the holding in Bowden based on the same venue policies long established by Missouri courts. Plaintiffs have cited no cases to support an argument to the contrary.<sup>5</sup> Thus, defendant Baker's waiver of improper venue should not be held to bind Ford to venue in Jackson County.

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<sup>5</sup> In fact, in Plaintiff's Answer to Petition for Writ of Prohibition, plaintiffs do not address this argument at all, but instead state, "Plaintiff continues to rely upon section 508.010(1) as the basis for venue in this action and Plaintiff asserts that venue is proper under that section." Thus, Ford assumes plaintiffs have abandoned their argument regarding this issue as indicated in their Answer to Relator's Petition for Writ of Prohibition. (See Plaintiff's Answer to Petition for Writ of Prohibition, Exhibit Q).

## **CONCLUSION**

Plaintiffs filed suit against two defendants, a corporation and an individual. Venue is not proper in Jackson County under section 508.010(2), the section governing cases with multiple defendants, because the cause of action did not accrue in Jackson County and neither defendant resides there. Even if plaintiffs were correct in applying section 508.010(1), the terms of the statute were not met because Ford was not “found” in Jackson County via plaintiffs’ service of non-managerial employee Roger Burnett, and there is no evidence or allegation in the record that plaintiffs Megan and Marissa Herring were residents of Jackson County. Further, defendant Baker’s waiver of improper venue does not bind Ford to improper venue in Jackson County. Thus, Ford respectfully requests this Court issue a Writ of Prohibition preventing Respondent from taking further action on this matter other than dismissing the action or transferring it to a county where venue is proper.



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**RULE 84.06(C) CERTIFICATION**

Pursuant to Mo. R. Civ. P. 84.06(c) and, the undersigned hereby certifies that: (1) this brief includes the information required by Rule 55.03; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) this brief contains 7,151 words, as calculated by the Microsoft Word software used to prepare this brief.

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing (plus one copy on a floppy disk that Relator hereby certifies was scanned for viruses and is virus free) were mailed, postage prepaid, this \_\_\_\_ day of October, 2004, to:

The Honorable Michael W. Manners  
Circuit Judge - Circuit Court, Division 2  
Jackson County Courthouse  
308 W. Kansas  
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